



IMMIGRATION UPDATES

Can We Still Hire Foreign Employees in a
Pro Enforcement Environment?



Presenters



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- Focuses practice primarily on business immigration and corporate visa matters related to businesses seeking to employ both skilled and unskilled workers who are either in the United States or are currently abroad.
- Assists businesses and organizations seeking to sponsor employees for both non-immigrant and immigrant visa status and advise them of their responsibilities in the immigration process.
- Regularly advises human resources professionals in industries such as public, private and charter school systems, universities, the hospitality industry and the high-tech research organization through various stages of international recruitment while they navigate through the immigration process.



Nonimmigrant Visas (Temporary visas)

- Nonimmigrant Visa (NIV) Status
 - Temporary intent to remain in U.S.
 - Some NIVs allow for Dual Intent
 - Restrictions on foreign nationals from certain countries
 - NIV holders need a passport valid for 6 months beyond the time of anticipated stay
 - Authorized period of stay in the U.S. is dictated by the I-94 (the white card)—not the Visa



H-1B visas

- H-1B– Specialty Occupation Visa
 - Issued for a total of 6 years in three year increments
 - Employer specific
 - Beneficiaries require a Bachelors degree or higher in the field that they will be working
 - If beneficiary holds a foreign degree, the degree **MUST** be evaluated for a U.S. equivalency
 - Allows for Dual intent
 - Only 65,000 H-1Bs issued per year (FY from October 1 to September 30)
 - Employers may file for the next fiscal year beginning on April 1, 2010 (6 months prior to start date).



H-2B Visas

- ❑ For temporary employment and a labor certification is required to demonstrate the unavailability of U.S. workers.
- ❑ Workers must establish that they have a temporary intent to work in the U.S. (no more than one year) and that they intend to leave the U.S. upon completion of work.
- ❑ The temporary needs must be either a **One Time Occurrence** (ER never used H-2B worker and will not use in the future); **Seasonal Need** (need is connected to a particular tie of year b/c of recurring event of pattern); **Peak-Load Need** (temp. need for additional staff b/c of short-term demand); **Intermittent Need** (ER has occasional need for workers from time to time but not on a regular basis)
- ❑ Frequent positions hired with H-2B visas– restaurant workers, hotel housecleaning staff, etc.



L-1 Visas

Intra-Company Transferees: a person who worked for a company abroad in an executive, managerial, or “specialized knowledge” (detailed understanding of the company’s products/services and the international markets for those products/services. Or, advanced knowledge of company processes and procedures. Knowledge that can be obtained only through experience with that employer) capacity for at least one year within the past three (3) years and is coming to the U.S. to work for a related (parent, subsidiary, affiliate, or branch) company in one of those three types of positions.



Blanket L-1 visas

- ❑ Companies who frequently use L-1 visas may apply for a Blanket L-1. Large companies can petition for a Blanket L-1 to have the flexibility to transfer people to the U.S. quickly and on short notice without having to file the petition with the USCIS. A special form is submitted to the U.S. consulate abroad to grant the individual an L-1 to enter the U.S.
- ❑ **Criteria for Companies to apply for a Blanket L-1**
 - U.S. office for a least one year
 - 3 or more branches, subsidiaries, or affiliates
 - One of the following: U.S. annual sales of \$25 million, U.S. workforce of 1000 or at least 10 L-1 petition approvals in the past year



J-1 VISA

- **J-1- Exchange visitor visa**
 - Issued to individuals who take part in a wide range of exchange visitor programs sponsored by schools, businesses, and a variety of organizations and institutions.
 - Several exchange programs for young people including summer employment programs, internship programs for university students and au-pair programs
 - Individuals meet the criteria for a J-1 exchange Visitor if they are coming to the US. as a au pair, camp counselor, student, college/university, student/secondary, government visitor, international visitor, alien physician, professor, research scholar, short-term scholar, specialist, summer work/travel, teacher, trainee or a cultural enrichment program that is specifically designed for such individuals by the U.S. Department of State.
 - Some positions from certain countries require the exchange visitor to be subject to a two year foreign residency which requires them to return who for at least two years or receive a waiver of that requirement. The individual cannot change their status to that of an H, L, K or a permanent resident (green card holder) until they meet the requirement or receive a waiver.



Other NIVs that may be used in the hospitality industry

- F-1 visas (student visas)– foreign nationals who are still finishing their education.
 - OPT (Optional Practical Training)– expires in 1 year from date of issuance. OPT is granted at the completion of the degree program to allow the FN to work for up to one year in an area in their field.

TN Visas

Used by Canadians and Mexicans– For select positions only.
Relevant hospitality industry related positions are:
Accountant; Computer systems analyst; hotel manager;
and lawyer.



Q and O visas

- ❑ Q visa– for certain international cultural exchange programs designed to provide practical training and employment, and sharing of the history, culture, and traditions of participants home country in the United States.
- ❑ O visa– foreign nationals who are coming temporarily and have extraordinary ability in the arts or sciences.



Ways to sponsor individuals for Green cards

- ❑ **First Preference Category**– Aliens of Extraordinary Ability such as Outstanding Professors and Researchers and individuals sponsored as Managers or Executives (L-1 visa holders)
- ❑ **Second Preference Category**– Members of Professions Holding Advance Degrees (or its equivalent) or Persons of Exceptional Ability who are eligible for National Interest Waivers
- ❑ **Third Preference**– Skilled Workers, Professionals and Other Workers– ** The most common category for petitioning for a teacher
 - Category is currently backlogged approximately 4 years



I-9 Compliance

Basic Provisions of IRCA

- The Immigration Reform and Control Act of 1986 (IRCA) contains three basic elements that impact every U.S. Employer's personnel practices:
 - IRCA prohibits employers from knowingly hiring any alien who is not authorized to work in the United States.
 - The Act requires all employers to complete and retain a form, provided by the Immigration and Naturalization Service (INS), certifying that they have checked certain documents which verify.
 - IRCA prohibits discrimination on the basis of sex, race, religion and national origin. Every U.S. Employer must treat U.S. citizens, permanent residents, and all aliens similarly. The lack of authorization to work may not be inferred from an employee's appearance or accent.



I-9 Compliance, continued

- ❑ Must use most recently updated form: February 2, 2009
- ❑ It is unlawful to hire any employee without inspecting certain documents verifying the EE's identity and their authorization to work in the U.S.
- ❑ The Employer is required to keep a record documenting the verification. The I-9 document satisfies this requirement.
- ❑ The documentation provisions apply to all employees hired after November 6, 1986 and who continue to be employed after May 31, 1987
- ❑ I-9 COMPLIANCE APPLIES TO ALL EMPLOYEES, REGARDLESS OF THEIR CITIZENSHIP AND REGARDLESS OF WHETHER THE EMPLOYEE IS PERSONALLY KNOWN TO THE EMPLOYER
- ❑ This requirement only applies to those applicants who are actually hired



I-9 Compliance, continued

- Section 2 Employer Review and Verification:
 - Completed by the employer
 - Documents examined must be the original
 - Company has the responsibility to ensure that the documents appear to relate to the individual presenting the documents
 - The document identification number and expiration date (if any) must be noted in the appropriate space on Form I-9
 - Employer should maintain an internal tickler system which record the expiration dates of temporary employment authorization documents
 - Refer to list of documents which an employer may rely on (See complete list of acceptable documents in your packet. Only some of these are listed on Form I-9)
 - Only certain documentation are recognized as establishing both identify and employment eligibility (List A) while others are recognized only for identity (List B) or work authorization (List C)
 - The Employer should NOT request more than the minimum necessary documentation nor may the company specify which documents will be accepted.
 - The Employer may retain photocopies of the documents presented by the individual with Form I-9



When to Verify I-9 Documents

- ❑ Must verify the employee's identity and work authorization within three business days of the “date of hire” – which is the date the employee actually starts work
- ❑ If the employee is hired for less than three days of work, verification must be completed at the time of hire.



Expiration of Employment Authorization

- ❑ Companies may wish to develop an internal tickler system
- ❑ Prior to expiration of employment authorization, the Company must reverify the individual's I-9 form
- ❑ Employee must present a document that shows either an extension of the employee's initial employment authorization or new employment authorization. PLEASE NOTE: an expiration date on Form I-551 (the green card) reflects only that the card must be renewed, not that the individual's work authorization has expired
- ❑ To maintain continuous employment eligibility, an employee with temporary work authorization should apply for new work authorization at least 90 days before the expiration date



Form I-9 Retention

- ❑ The Employer must retain I-9 forms and have them available for inspection for a minimum of three years after the date of hire or one year after the employment terminates, whichever is later
- ❑ For easy accessibility, I-9 forms should be maintained together, with photocopies of documents presented, in a confidential file, separate from other records



Labor and Employment Law Factors that Apply to Foreign Nationals

- ❑ Protection under Fair Labor Standards Act
- ❑ Foreign workers entitled to federal employment protection

National Labor Relations Act

- Foreign workers including both undocumented workers and nonimmigrant workers are considered employees under the National Labor Relations Act.
- Foreign workers status (legal vs. illegal/undocumented) is irrelevant to an unfair labor practice proceeding.
- Foreign National's status as an employee means that the employer is still liable for unlawful discharge and that the employer who knowingly hires undocumented workers is even required to conditionally reinstate an employee by holding open a position and giving the employee a reasonable time to obtain employment authorization.



Protection under the National Labor Relations Act

- ❑ Backpay and Reinstatement under NLRA
 - The NLRB may not provide undocumented persons who are not authorized to work a backpay award (even where the Employer knowingly hires the Foreign worker who is not authorized to work)
- ❑ But, several courts have upheld the right of an undocumented worker to receive workers' compensation benefits
- ❑ Although Foreign Nationals are not entitled to back pay under the National Labor Relations Act, they are entitled to back pay under Title VII if they qualify
- ❑ Title VII may not extend to a non- US Citizen (i.e.. LPR) working outside the US



Worksite Enforcement

- ❑ Dept. of Homeland Security has responsibility to enforce the law and engage in effective worksite enforcement to reduce the demand for illegal employment and protect employment opportunities for the U.S. workforce.
- ❑ Recent vigorous efforts by Immigration Customs & Enforcement (ICE) has ripped apart immigrant communities and families, while ICE detains parents who have been picked up in worksite raids.
- ❑ ICE often indiscriminately targeted workers who fit certain racial/ethnic profiles and, as a result, ICE has even wrongfully detained and deported, US Citizens and Lawful permanent residents.



Workforce Enforcement, Continued

- ❑ ICE has treated immigrant workers as criminals, requiring those whom the agency has detained and released pending further proceedings to wear electronic “ankle bracelet” monitors.
- ❑ In 2008, of the more than 6,000 arrests related to worksite enforcement, only 135 were employers
- ❑ **Worksite investigation triggers:** Oftentimes a disgruntled former employee or competitor will relate info. to ICE.
- ❑ Once an investigation begins, it relies on various methods to build its case: **Investigations by ICE; confidential informants; cooperating witnesses; consensual electronic surveillance; data from governmental agencies (SSA, DOL wage and hour division); visits to worksite or homes of company representatives; an arrested employee who gives info. regarding lax compliance policies or intentional conduct by employer**



Raids Across the U.S. in 2008-2009

- ❑ **May 2008**-- Agriprocessors, Inc. – raid on kosher meat processing facility in Postville, Iowa resulted in unprecedented criminal prosecution and conviction of 302 for identity theft, false use of SSN and other crimes. Immigration hearings were held in mass at cattle slaughter grounds. This was a new tactic of criminalization of undocumented workers; SF Bay area: El Balazo Mexican Restaurants, 11 restaurants raided and 63 employees
- ❑ **July 2008**– Ohio (8 different cities)– 58 workers arrested at Casa Fiesta chain of Mexican restaurants; Waipahu, Hawaii: 43 workers arrested at The Farms, Inc. agricultural company; Providence Rhode Island,: 31 cleaning/maintenance staff arrested at 6 different State Courthouses; Loveland, Colorado: 18 workers arrested a Colorado Precast Concrete
- ❑ **August 2008**– Ashville, NC: 59 workers arrested at Mills Manufacturing Plant; Dulles, Virginia: 42 construction workers arrested at Dulles International Airport; Laurel, Mississippi: Howard Industries, Inc.– 595 arrested—operation was so big that the communities in Mississippi were warned of the convergence of ICE agents (Co. were enrolled in E-Verify)
- ❑ **September 2008**– Arcata, CA: 23 workers arrested at the Sun Valley Flower Farms (Co. received SSA No Match letters in May 2008 and fired all workers listed but were raided 4 months later)
- ❑ **October 2008**—Greenville, SC: 331 factory workers arrested at Columbia Farms
- ❑ **February 2009**– Bellingham, Washington– raid at Yamato Engine Specialist, resulting in 28 people arrested



New Trends in Worksite Enforcement Raids

- ❑ Homeland Security Secretary, Janet Napolitano has delayed a series of proposed immigration raids and other enforcement actions at US. Workplaces . She wants agents to apply more scrutiny to the selection and investigation of targets as well as timing of raids.
- ❑ DHS has determined that an effective strategy must address both employers who knowingly hire illegal workers as well as the workers themselves. Therefore, there is a renewed focus to target criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers.



New Trends in Worksite Enforcement Raids, continued

- ❑ ICE will now focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration
- ❑ Upon investigation, ICE officers will look for evidence of mistreatment of workers, evidence of trafficking, smuggling, harboring, visa fraud, identification fraud, money laundering, and other such criminal conduct
- ❑ Some courts are convicting employers for “harboring” regarding harboring an illegal alien because where there is knowledge or reckless disregard of the alien’s unlawful status, the defendant’s conduct tended to substantially facilitate the alien’s remaining in the U.S. illegally.



New Trends in Worksite Enforcement Raids, continued

- ❑ Another criminal statute being utilized directly prohibits an employer from engaging in a pattern or practice of hiring or continuing the employment of unauthorized alien.
- ❑ DHS will continue to work with partners in the public and private sectors to maintain a legal workforce through training and employee verification tools like E-Verify, which improves the accuracy of determinations of employment eligibility and combat illegal employment